Testimony of

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Agreements: Safeguarding Workers' Rights"

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I. INTRODUCTION

On behalf of myself and my esteemed colleague, Member Liebman, I want to thank Chairman Harkin, Ranking Member Specter, and all of the Members of this committee for inviting us to testify today on the vitally important issue of safeguarding workers' rights. Senator Specter, I want particularly to thank you for your longstanding and consistent support of the National Labor Relations Board. Your example in this regard inspires all of us who work to make the promise of the National Labor Relations Act a reality.

A little over five years ago, I had the honor and privilege of becoming a Member of the NLRB. Two weeks ago, I received the added honor, and responsibility, of being designated by the President to serve as the Board's Chairman. Just to give you a little background, I began my legal career as a local prosecutor. I then served as an Assistant U.S. Attorney for the District of Columbia and as Associate Director of a Law Department Division in the Office of the Comptroller of the Currency before entering private practice,

where I primarily engaged in federal trial and appellate litigation. Before joining the Board, I served for a number of years as a labor arbitrator.

You have invited us today to discuss two topics: (1) the Board's representation-election procedures, and (2) first contract negotiations in those instances in which employees have exercised their right to designate a collective bargaining representative. I will address those subjects and do my best to answer your questions concerning them. Preliminarily, however, it has long been a tradition of the Board that its sitting Members avoid commenting on legislative proposals to amend the Act or on matters pending before the Board. This tradition is intended to preserve our role as impartial arbiters of labor-management disputes under the Act, and I will respectfully adhere to it in my testimony.

The NLRB is an independent federal agency created by Congress in 1935 to administer the National Labor Relations Act (NLRA or Act), the primary law governing relations between unions and employers in the private sector. A cornerstone of the NLRA, as amended in 1947 by the Taft-Hartley Act, is the principle and practice of workplace democracy. That is, employees have the right to engage in, or to refrain from, organizing activities, and to express their choice on representation in an atmosphere free from coercion. The Board's paramount purpose is to insure that those rights, guaranteed in Section 7 and implemented in Sections 8 and 9 of the Act, are fully realized. The facts and figures that I will present this morning will show that the Board's record in achieving these goals is an exemplary one.

II. THE NLRB'S REPRESENTATION CASE PROCESS

Though many of this Committee's Members are familiar with the Board's representation case process, it may be helpful to briefly outline some general statutory principles and how the system works in practice.

First, as the Supreme Court has emphasized, "[t]he Act is wholly neutral when it comes to [the] basic choice" of employees to choose or reject union representation.[1] That is, the Act guarantees employees the right to make their own informed judgments about the benefits of union representation and collective bargaining. Although employees are permitted to choose union representation through other means, the Act ensures that employee free choice may be tested through secret ballot elections, which both the courts and the Board have frequently acknowledged as the preferred and most reliable means of determining employee sentiment.[2]

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[1] *NLRB v. Savair Mfg. Co.,* 414 U.S. 270, 278 (1973).
[2] *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 602 (1969); *Underground Service Alert,* 315 NLRB 958, 960 (1994).

The Board's electoral process—or, more precisely, its representation process—is described in Section 9 of the Act. Section 9(a) sets forth the principles of majority rule and exclusive representation. Section 9(b) deals with the determination of the unit of employees in which an election will be held—that is, an "appropriate" bargaining unit. Section 9(c) details the actual representation process, from the filing of an election petition through the post-election certification of the employees' choice.

The representation process begins when a petition is filed with one of the Board's regional offices. The two most frequently filed petitions are RC and RD petitions. RC petitions seek an election to *certify* a union as the unit employees' bargaining representative. RD petitions seek an election to *decertify* a union. RM petitions, which are filed by the employer, may be filed if an employer receives a demand for recognition from a union, or if the employer is reasonably uncertain whether an incumbent labor organization continues to enjoy majority support.

After a representation petition is filed, it officially becomes a "case"—a representation or "R" case. Consistent with the primacy of elections in the scheme of the Act, the Board gives such cases a high priority. The Agency's goal is to conduct an election within a median of 42 days of the filing of the petition. Thus, when a petition is filed, the regional office promptly assigns a Board agent to process it, generally on the very day the petition is filed. The Board agent contacts the parties and investigates certain threshold issues, including jurisdiction, possible bars to an election (such as outstanding unremedied unfair labor practices), a union certification or earlier valid election within the preceding year, and the sufficiency of the showing of employee interest in support of the petition (30%). In the course of this investigation, the agent attempts to convince the parties to agree on an appropriate unit as well as on the date, time, and location for the election. Typically, over 90% of pre-election issues are resolved through agreement of the parties.

In those relatively few cases where the parties do not reach agreement on the pre-election issues, the region conducts a pre-election hearing. After hearing the evidence and reviewing the parties' briefs, the Regional Director issues a decision either directing an election in an appropriate unit or dismissing the petition. Any party may request review by the Board of the Regional Director's decision. Section 102.67(c) of the Board's Rules and Regulations prescribes standards that the Board applies in deciding whether to grant or deny such a request for review. The Board's goal is to act on a request for review within 14 days of its filing. If review is granted, the record of the pre-election hearing is transmitted to the Board, and the parties have 14 days to file briefs. Meanwhile, however, the election usually goes ahead as planned, and the ballots are impounded pending resolution of the issue or issues under review.

During the election, the parties and the Board agent may challenge the eligibility of particular individuals who seek to vote, and those ballots are impounded. After the election, the Board agent tallies the uncontested ballots and immediately communicates that tally to the parties. The parties have 7 days to file objections to the election. If no objections are timely filed, and if any challenged ballots are insufficient in number to change the election outcome, the Regional Director issues a certification of election results (if the union has lost) or a certification of bargaining representative (if the union has won). If there are objections or enough challenged ballots to potentially affect the outcome, the region conducts an investigation and, if necessary, a hearing before a Hearing Officer, after which briefs may be filed. The Regional Director then issues a decision resolving the objections and/or challenges. Parties may appeal these post-election decisions to the Board.

III. THE AGENCY'S PERFORMANCE

A. REPRESENTATION CASES

By any definition, the Agency is successfully carrying out its statutory mission to administer the representation procedures authorized under Section 9 of the National Labor Relations Act.

In FY 2007, 2,302 RC petitions, 662 RD petitions, and 92 RM petitions were filed, for a total of 3,056 representation petitions. Of the 2,302 RC petitions filed, elections occurred in 2,030 cases. As stated above, the Agency has established as one of its overarching goals to conduct elections within a median of 42 days of petition-filing. We exceeded that goal in FY 2007: the median number of days from petition to election was 39 days, with 93% of all elections being conducted within 56 days.

These results were achieved in part because mutually agreed-upon stipulated pre-election agreements were reached between the union and the employer in the vast majority of cases -- 91.2% in FY 2007. In the 186 cases in which there was no stipulated election agreement, Regional Directors held hearings and issued pre-election Decisions and Directions of Election (D&DE). Even there, however, 93.9% of D&DEs were rendered within 36 days of petition filing. That is 36 days to hold the hearing, to obtain briefs from the parties, to review the record and briefs, and to write the Regional Director's decision. Now that, I submit, is prompt action.

The results of elections held in FY 2007 show that the union was successful a majority of the time. Employees chose a collective bargaining representative in 59.2% of RC elections, 35.1% of RD elections, and 33.3% of RM elections, for an overall union success rate of 50.4%. That rate has increased in the first five months of FY 2008. During that time, the NLRB has

held 737 representation elections, of which unions won 57.1 percent, with 94.6 percent of elections held within 56 days.

In 2007, objections or challenges were filed in only 155 elections. Of that number, some were withdrawn and 127 required decisions by a Regional Director. Of those 127, 55 were decided after investigation and without a hearing; 73, after a hearing. The median number of days from the filing of objections or challenges to the issuance of a Regional Director's decision was 25 in non-hearing cases, 61 in hearing cases.

Parties can also request Board review of a pre-election Decision and Direction of Election, and they can file a post-election appeal to the Board from a Regional Director's or Hearing Officer's report on objections or challenged ballots. In FY 2007, fewer than one-half of 1% (.04%) of the total number of representation cases processed by the Regional Offices—numerically, 224 cases—were appealed to the Board. Specifically, there were 113 pre-election requests for review. The Board denied review in 96 of these cases in a median time of 14 days. There were 111 post-election appeals filed. The Board issued decisions in 105 of these cases in a median time of 131 days. The Agency resolved 78.83% of all representation cases within 100 days.

B. UNFAIR LABOR PRACTICE CASES

The Board's exemplary track record in processing representation cases provides an incomplete picture, however, of the Board's overall effectiveness in protecting worker's rights under Section 7 of the Act. After all, the employee's right to make an informed election choice is realized only if it is exercised in an atmosphere free of intimidation and coercion. Furthermore, when a collective bargaining representative has been freely chosen by the employees, the Board vigorously enforces the obligations of the parties to meet and bargain in good faith and, when necessary, acts to protect the union's majority status from unlawful denigration by the employer.

As the following data show, the Board's overall record in processing all unfair labor practice cases is quite impressive.

First, the big picture. From FY 2002 through FY 2007, the Board issued almost 500 cases a year. As of the end of FY 2007, the median number of days an unfair labor practice case had been pending at the Board was 181; for representation cases, the median was 88 days. As of the same date, the Board had reduced its backlog to 207 cases—a reduction of some 66.5 percent over five years. The Board is at the lowest case inventory level in over 30 years. Granted, a lower intake of cases helped in this effort, but so did the very hard work of the Agency's many dedicated public servants.

The NLRB seeks to serve the public quickly, efficiently, and fairly. In the overwhelming number of cases, this objective is achieved. To illustrate, about one-third of unfair labor practice charges filed with the Agency are determined, after investigation, to have merit. Most of these investigations are completed in about 77 days. The other two-thirds of the cases are withdrawn or dismissed, usually for lack of merit or insufficient evidence.

Where settlement of meritorious cases could not be achieved, complaint issued in a median of 98 days from the date of the charge in FY 2007, and a median of 89 days thus far during FY 2008. Stated differently, in about 12 weeks, the Agency is able to complete intake, docket, investigate, and determine, from among the thousands of charges filed (more than 22,000 in FY 2007), which cases warrant further proceedings and which do not.

In FY 2007 and for the first five months of FY 2008, the Board was able to resolve, through settlements, about 97% of those cases determined to be meritorious. Absent settlement, cases go to hearing before an Administrative Law Judge, where the attorney representing the General Counsel presents evidence to try to prove the allegations of the complaint. The judge hears the evidence, resolves disputes in the testimony between witnesses, identifies the legal issues, reviews the parties' briefs, and issues a decision, which then can be appealed to the five-Member Board in Washington. In about one-third of the judges' decisions, compliance is achieved without the need for further review. The other two-thirds – again that is of the 3% of all meritorious charges -- are appealed to the Board for resolution.

Once the Board decision has issued, an aggrieved party may seek review in the U.S. Courts of Appeals. That occurred in 119 Board cases in FY 2007, and 42 cases during the first five months of FY 2008. The Board's enforcement rate on appeal has been outstanding. In FY 2007, appellate courts enforced 97% of the Board's decisions in whole or part. For the first five months of FY 2008, the Board prevailed in whole or part in 91 percent of the cases. Further appeal to the Supreme Court is possible, but happens in only a minute number of cases.

In terms of time and efficiency, the NLRB's administrative process works extraordinarily well in the overwhelming number of the cases filed with our regional offices. For the 2 percent of the cases that reach the Board for decision, the vast majority issue within a reasonable time. However, the process does occasionally bog down. Several cases have languished at the Board for unconscionable periods, although not infrequently for reasons (e.g., turnover among Board Members, multiple court remands) beyond the Agency's control. Regrettably, these few instances of inefficiency[3] often

[3] The cases in which the Board has failed to meet its case processing goals under the Government Performance and Results Act (GPRA), only represent about one-half of 1 percent of the total number of cases the Agency receives.

become the standard against which the Board is judged. That is not only misleading as a matter of fact, but it does a great disservice to the Agency's dedicated and talented employees.

The Board's success in enforcing the Act and achieving monetary remedies for employees is also worthy of note. In bottom-line terms, in FY 2007 the NLRB collected $110,388,806 in backpay and obtained reinstatement offers for 2,456 employees. During the first five months of FY 2008, the Agency has collected $30,156,630 in backpay and obtained reinstatement offers for 666 employees. Over the past five years, the Agency has recovered a total of $604 million in backpay, fines, and reimbursement of fees and dues, with 13,279 employees offered reinstatement.

IV. FIRST CONTRACT NEGOTIATIONS

The NLRA and Board and court precedent establish a number of principles applicable to collective bargaining generally, including bargaining for initial contracts. For example, employers and unions must meet and bargain in good faith and at reasonable times. Similarly, the duty to bargain includes a duty to provide, upon request, information that is relevant to subjects of bargaining. The Act also precludes abusive conduct, direct dealing with employees, or other behavior designed to undermine a union's status as the employee's designated representative. The Act does not, however, compel parties to reach agreement on any contractual provision, and the Board has no authority to interject itself into the bargaining process or to impose what it believes would be a desirable agreement. See, e.g., *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970), in which the Supreme Court observed that the Board is without power to compel an employer and a union to agree and, when agreement is impossible to achieve, "it was never intended that the Government would step in, become a party to the negotiations and impose it own version of a desirable settlement."

However, the Board does have the authority to and will intervene when an employer engages in conduct designed to delay, undermine, or frustrate bargaining, such as:

- Refusing to meet at reasonable times and/or places.
- Surface bargaining or bargaining in bad faith.
- Making unexplained regressive proposals.
- Denigrating the union or engaging in direct dealing.
- Refusing to provide the union with information.
- Making unilateral changes in terms and conditions of employment.
- Declaring impasse prematurely and implementing its proposals.
- Refusing to execute an agreement reached in negotiations.

In such circumstances, where a violation is found, the Board has wide latitude to order remedies designed to bring the parties back to the table and to restore the bargaining relationship. Among the remedies available to the Board are the following:

- Ordering a party to cease and desist from unlawful conduct.
- Ordering the wrongdoing party to bargain in good faith.
- Requiring bargaining to occur on fixed, reasonable schedules.
- Extending the "certification year" period during which the union's majority status cannot be challenged.
- Requiring the prompt production of information that is necessary and relevant to negotiations.
- Requiring the restoration of unilaterally changed terms and conditions.
- Awarding backpay to employees for losses resulting from unilateral changes.
- Awarding reinstatement and back pay to employees discharged for participating the negotiation process.
- Reimbursement of bargaining costs.

In addition, although the Act does not require the parties to reach an agreement or authorize the government or a government-sponsored arbitrator to impose contract terms, the Act, a robust body of Board law, and economic realities all serve to exert pressure on the parties to reach prompt agreement. For example:

- Negotiations can be expensive and time consuming for both employers and unions and may detract from other imperatives (for the employer, providing goods and services; for the union, organizing new and servicing existing bargaining units).
- Subject to a few well-defined and narrow exceptions, once a union has been selected as the collective bargaining representative, the employer cannot make changes in terms and conditions of employment until it concludes an agreement or bargains to *overall*—not "issue by issue"—impasse.
- Having achieved the status of the employees' collective bargaining representative, unions have significant incentive to deliver on promises made during the campaign.
- Some unions voluntarily self-impose an economic incentive to reach prompt agreement by foregoing dues from newly-represented employees until a contract is reached.
- The employer may want to reach agreement in order to preserve employee morale and avoid a strike and its attendant economic consequences.
- The union will prefer to obtain a contract during the first year after its certification, during which it enjoys an irrebuttable presumption of majority support. If a contract is not reached, employees may become disgruntled and file a decertification petition after the certification year ends.

- Employers, recognizing all this, may be encouraged to bargain in good faith because a decertification petition can be blocked by charges that the employer failed to meet and bargain in good faith or that unlawful unilateral changes were made to terms and conditions of employment.

In short, the Act and precedent arising thereunder provide a comprehensive scheme of rules, principles, and remedies to regulate, safeguard, and facilitate collective bargaining. Ultimately, however, the Act does not compel agreement, and whether and what terms are actually reached is primarily a function of the incentives just outlined and the parties' respective economic leverage.

It is true, as FMCS and other data indicate, that first contract negotiations tend to be more protracted and contentious than successor negotiations. However, there are many reasons for that, most of which have nothing to do with the Board's election processes. A union new to a bargaining relationship obviously needs time to seek information and to understand the nature of the employer's business operations and the issues important to its members. The parties need to engage in the time-consuming process of developing detailed proposals on the many and various terms and conditions of employment that will form the framework for successor agreements. Parties also generally will be testing the flexibility, economic leverage, and pain thresholds of their bargaining partners for the first time. Unions may have made unrealistic promises during the course of the campaign to secure employee support, making agreement difficult or impossible. In short, initial contract negotiations frequently do require more time than successor negotiations, but that fact is hardly surprising, and does not, in my view, necessarily demonstrate any statutory deficiency or failure on the part of the Board.

It is also interesting to note that while a not insignificant percentage of the refusal-to-bargain unfair labor practice charges filed with the Board involve conduct occurring in first-contract negotiations (43.63% in 2005, 24.29% in 2006, and 25.68% in 2007), such cases still represent a relatively small percentage of the RC certifications in which meritorious charges are found (between12.83% and 19.79% between FY 2002 through FY 2007).

V. AGENCY INITIATIVES TO EXPEDITE ELECTIONS AND FACILITATE FIRST CONTRACT NEGOTIATIONS

As noted earlier, for many years the Agency has given representation-election cases a high priority. Our rules and regulations in such cases are specifically designed to facilitate rapid processing of election petitions and the certification of election results. Various general counsels, under Republican and Democratic administrations alike, have refined those procedures and instituted and enforced tight deadlines for virtually every stage of the election process. On the Board side, the Agency established a specialized unit—the

"R-Unit"—solely devoted to resolution of representation-case issues, and we have implemented practices and procedures to ensure that such cases are resolved expeditiously. For example, whereas the Board typically processes most unfair labor practice cases through a "subpanel" system in which members of the Board participate through their staff representatives, the Board considers and decides representation cases under what we call the Superpanel system. Under that system, R-Unit cases are expeditiously briefed and presented to a panel of the members themselves for discussion and decision there and then. For the most part, that system results in immediate decisions, which are communicated promptly to the Regional Offices and parties. During my tenure at the Board, I can state unequivocally that each of the Board Members with whom I have served has demonstrated an absolute commitment to rapidly processing our representation cases. Indeed, the Agency's overall success in rapidly processing R cases has been outstanding, as discussed more fully above.

In addition to the existing structural and procedural steps taken to expedite the election process, the Agency has recently undertaken several new initiatives to respond to contentions, however questionable as a matter of fact, that the Board's election machinery moves too slowly.

The first initiative is the Board's website and expanded outreach efforts. Some commentators have complained that employees are often unaware of their rights under the NLRA or how to go about seeking representation. The Board's website, which has received accolades for its breadth of information and easy accessibility, provides easy-to-understand and comprehensive guidance to employees about the rights protected by our statute and the process of seeking workplace representation. Assuming we have the budget resources to devote to it, we hope to continue to expand and develop our website and outreach efforts.

The second recent initiative was the GPRA initiative instituted last year by my predecessor and colleague, Chairman Robert Battista. Under that initiative, the Board Members and Agency attorneys worked feverishly and, in my view, extremely collaboratively to reduce our inventory of older cases and to achieve our case processing objectives. Although we fell just short of meeting our unfair labor practice case GPRA goals, we did meet all of our representation case GPRA objectives. I am committed, notwithstanding the fact that we are now down to only two Members, to continuing many of the practices and approaches employed during last year's GPRA push.

The third recent initiative is the expanded use of technology. The Agency is in the midst of revamping our case processing, document management, database and Internet technologies. We have instituted electronic filing in a number of areas, and are in the process of expanding that program. On the Board side, we have a new software system for managing

our caseload and tracking decisions through to issuance. On an Agency-wide basis, we envision having in place a seamless system that will permit all cases, including representation cases, to move quickly through each stage of the process in a paperless environment. A year ago, we began building an enterprise case management system, which will take another 2-3 years to complete, depending upon our funding.

An additional expansion of our use of technology in the representation case arena is the Video Testimony Pilot Program. Under this program, to speed up the processing of pre- and post-election hearings, the Agency is utilizing, in appropriate cases, video testimony, rather than incurring the expense and delay of bringing in witnesses from remote locations. We envision that programs of this type will make the Board's resources more accessible and will permit cases to be processed more efficiently.

A fourth recent initiative is the proposed "RJ" petition, which has been published for notice and comment in the Federal Register. This petition would provide a mechanism allowing a union and employer to file a joint petition for an election within 28 days of the filing of the petition. The petition would include an agreed-upon election date, description of the bargaining unit, payroll period for eligibility, and *Excelsior* list (identifying the employees in the bargaining unit). There would be no requirement for a showing of interest, and any party seeking to intervene would have to do so within 14 days. Unlike the current system, in which blocking charges (alleging unfair labor practices) may delay the election, such charges would instead be resolved through post-election proceedings. Lastly, under the RJ petition, all election and post-election matters would be resolved with finality by the Regional Director. Although we recognize that the RJ petition in its current form raises a number of issues that will need to be resolved, if adopted in some form the RJ petition would address many of the frequently-raised complaints about the Board's existing election process.

Two final recent initiatives, instituted by General Counsel Meisburg, are focused on (1) ensuring that employees have freedom of choice based on a timely opportunity to vote in Board-conducted elections in an uncoerced atmosphere, and (2) protecting the choice of employees who have elected union representation while first contract negotiations are ongoing. General Counsel Meisburg has issued two recent memoranda outlining a comprehensive program intended to protect new bargaining relationships and to foster accord on collective bargaining agreements. That program is described in detail in two General Counsel Memoranda, appended hereto as Exhibits A and B. In brief, under this initiative, the General Counsel is closely monitoring and aggressively pursuing injunctive relief and special remedies in cases involving employer unfair labor practices during either union organizing campaigns or first contract negotiations. Among the special remedies the General Counsel is asking the Regions to consider are requiring bargaining on

a prescribed or compressed schedule; requiring periodic reports on bargaining status; imposing a minimum six-month extension of the certification year; and reimbursement of bargaining costs.

CONCLUSION

As I hope the foregoing demonstrates, the Board is successfully and efficiently carrying out its statutory mandate. We are continuing to find new and different, and frequently better, ways of investigating, processing, litigating, and deciding cases and conducting elections. The Agency's accomplishments, gauged by almost any statistical measure, have been impressive, and are a testament to the dedication and diligence of our employees. We frequently hear that, regardless of the facts, what matters is the perception that the Agency and the statute are hopelessly broken and inefficient. I respectfully disagree. If there is a misperception, then our focus should be on correcting that misperception through communication and outreach efforts, not compounding that misperception by denigrating the Board. In my own view, both the Agency and the NLRA have proven to be remarkably flexible and adaptive over many years. The Board and the Act continue to effectively protect and to serve the American worker. Can both be improved? Undoubtedly. But the assertion that the Board and the NLRA are failing in their mission ignores, in my view, an undeniable record of success and accomplishment that spans the decades since the statute's enactment.

This concludes my statement. I would be pleased to answer your questions.

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